4 - 2004_6 pt_2.fm Page 76 Monday, August 9, 2004 3:13 PM

Brisdale Resources Sdn Bhd v Law Kim

HIGH COURT (KUALA LUMPUR) — RAYUAN SIVIL NO R2–12–833 OF 2001
FAIZA TAMBY CHIK J
5 AUGUST 2002

Civil Procedure — Locus standi — Sale of land — Deed of assignment signed — Whether plaintiff has locus standi to institute action — Whether assignment to bank absolute — Test to be considered

Contract — Sale and purchase of property — Terms — Agreement did not mention need to give notice to claim damages — Whether term could be implied — Specific Act pertaining to the area of law overrides general Act — Housing Developers (Control and Licensing) Act 1966; Contracts Act 1950

Land law — Housing Developers — Delivery of vacant possession — Late delivery of vacant possession — Failure to give notice of intention to claim damages — Whether plaintiff waived right to claim damages for late delivery — Housing Developers (Control and Licensing) Act 1966

The respondent, being the plaintiff in the sessions court proceedings, had succeeded in obtaining a summary judgment against the appellant (the defendant in the said proceedings) for liquidated damages for late delivery of vacant possession. Dissatisfied, the appellant/defendant appealed to this court and the issues raised were: (a) whether the plaintiff needs to give notice of his intention to claim for damages for late delivery; (b) whether the plaintiff needs to prove losses pursuant to s 75 of the Contracts Act 1950; and (c) whether the plaintiff who did sign the deed of assignment, had locus standi to institute this action.

Held, dismissing the appeal with costs:

(1) There was no provision in the sale and purchase agreement which required the plaintiff to give notice of his intention to claim for damages. The agreement was drafted in accordance with 'Schedule H' of the Housing Developers (Control and Licensing) Act 1966 for accommodation type and it is a statutory contract which cannot be 'contracted out', unless with the consent of the Controller of Housing or Government. The intention is to protect purchasers such as the plaintiff from the defendant who has more bargaining power and who unilaterally takes advantage of interpreting the plaintiff's conduct as a waiver and who could refuse to pay compensation even though in breach of the agreement (see paras 3 and 4).

(2) The agreed liquidated damages for late delivery of vacant possession as contained in cl 22 of the sale and purchase agreement was a mandatory provision. Therefore, the plaintiff need not prove his losses pursuant to s 75 of the Contracts Act 1950 (see para 8).

(3) Even though the plaintiff did sign the deed of assignment, his capacity to institute this action was not prejudiced because the assignment by the plaintiff to the bank was merely an assignment by way of charge

4 - 2004_6 pt_2.fm Page 77 Monday, August 9, 2004 3:13 PM

and not an absolute assignment. The assignment by the plaintiff to the bank are of the plaintiff's rights and interest in the sale and purchase agreements they entered with the defendant. There were covenants by the bank as assignor to reassign the said apartment back to the plaintiff in the event individual documents of title are issued, and if the loans are still then subsisting, to create registerable legal charges over the properties so secured. And if individual documents of title were not issued when the loans are repaid the assignors would reassign back the rights and interest in the sale and purchase agreements to the plaintiff (see paras 9 and 20).

(4) Furthermore, the bank, vide a deed of reassignment, had duly reassigned the plaintiff's right to claim all losses, compensation and costs from the defendant for late delivery of vacant possession of the apartment by the defendant. Hence, the plaintiff had locus to commence this action against the defendant (see paras 17 and 26).

(5) The defendant does not have any defence on merits. In fact, the defendant did not deny that they were in breach of the sale and purchase agreement entered between the plaintiff and the defendant. What was raised were notice, prove of damage and locus wherein these were technicalities and not strict defences on merit that deserved a full trial (see para 27).

[**Bahasa Malaysia summary**

Responden, yang merupakan plaintif dalam perbicaraaan di hadapan mahkamah sesyen, telah berupaya untuk mendapatkan penghakiman terus terhadap perayu (pihak defendan dalam perbicaraan tersebut) untuk ganti-rugi jumlah tertentu disebabkan kelewatan memberi milikan kosong kepadanya. Tidak berpuas hati, pihak perayu/defendan membuat rayuan ke mahkamah ini dan alasan-alasan yang dibangkitkan adalah: (a) sama ada plaintif mesti memberi notis niatnya untuk menuntut gantirugi penghantaran lewat; (b) sama ada plaintif harus membuktikan kerugian di bawah s 75 Akta Kontrak 1950; and (c) sama ada plaintif yang telah menandatangani suratikatan penyerahan hakmilik, mempunyai locus standi untuk memulakan tindakan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Tiada peruntukan dalam perjanjian jualbeli yang menghendaki plaintif memberi notis menyatakan niatnya untuk menuntut gantirugi. Perjanjian tersebut disediakan menurut'Jadual H'Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 untuk tempat kediaman dan ia adalah satu perjanjian statut yang tidak boleh 'contracted out' melainkan dengan persetujuan Pengawal Perumahan atau Kerajaan. Tujuannya adalah untuk melindungi pembeli seperti plaintif daripada defendan yang mempunyai lebih kuasa tawar-menawar dan yang secara satu pihak boleh mengambil kesempatan untuk membuat tafsiran tindakan plaintif sebagai pelepasan dan boleh menolak untuk membayar pampasan walaupun melanggar perjanjian (lihat perenggan 3 dan 4).

4 - 2004_6 pt_2.fm Page 78 Monday, August 9, 2004 3:13 PM

(2) Gantirugi jumlah tertentu yang dipersetujui untuk penghantaran lewat bagi milikan kosong seperti terkandung dalam kl 22 perjanjian jualbeli adalah peruntukan mandatori. Oleh itu, plaintif tidak perlu untuk membuktikan kerugian di bawah s 75 Akta Kontrak 1950. (lihat perenggan 8).

(3) Walaupun plaintif telah menandatangani suratikatan penyerahan hakmilik, keupayaannya untuk memulakan tindakan ini tidak diprejudiskan kerana penyerahan hak oleh plaintif kepada bank adalah semata-mata penyerahan hak milik melalui gadaian dan bukannya penyerahan hak milik mutlak. Penyerahan hak oleh plaintif kepada bank adalah hak dan kepentingan plaintif dalam perjanjian jualbeli dengan defendan. Ada waad oleh bank sebagai penyerahhak untuk serahhak semula tempat tinggal itu balik kepada plaintif apabila dokumen hakmilik individu dikeluarkan, dan jika pinjaman belum dijelaskan, untuk mewujudkan gadaian undang-undang yang boleh didaftar ke atas harta yang telah dicagar. Dan jika hakmilik individu tidak dikeluarkan apabila pinjaman dijelaskan penyerahhak akan menyerahkan kembali hak dan kepentingan dalam perjanjian jualbeli kepada plaintif (lihat perenggan 9 dan 20).

(4) Lagipun, pihak bank, melalui suratikatan penyerahan hakmilik, telah membuat penyerahan hak semula hak plaintif untuk menuntut semua kerugian, pampasan dan kos daripada defendan untuk penghantaran milikan kosong pangsapuri yang lewat oleh defendan. Justeru, plaintif mempunyai locus untuk memulakan tindakan ini terhadap defendan (lihat perenggan 17 dan 26).

(5) Defendan tidak mempunyai sebarang pembelaan berdasarkan merit. Malahan, defendan tidak menafikan bahawa mereka memungkiri perjanjian jualbeli antara plaintif dan defendan. Apa yang dibangkitkan adalah notis, bukti kerugian dan locus di mana ini merupakan keteknikan dan bukannnya pembelaan berdasarkan merit yang patut dibicarakan dengan penuh (lihat perenggan 27).]

Notes

For cases on locus standi in sale of land, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 3966.

For cases on terms in sale and purchase of property, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4412–4414.

For cases on delivery of vacant possession, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2602–2608.

For housing developers, see 8 *Halsbury's Laws of Malaysia*, paras [150.651]–[150.691].

Cases referred to

Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd [1997] 3 MLJ 620 (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Chuah Eng Khong v Malayan Banking Bhd [1998] 3 MLJ 97 (refd)

4 - 2004_6 pt_2.fm Page 79 Monday, August 9, 2004 3:13 PM

Lebbey Sdn Bhd v Tan Keng Hong & Anor [2000] 1 AMR 156, [2001] 7 MLJ 521 (refd)
Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd [1995] 4 MLJ 804 (refd)
Loke Yuen Cheng & Anor v Vimtex Sdn Bhd [1988] 4 MLJ 169 (refd)
Mahadevan & Anor v Manila & Sons (M) Sdn Bhd [1984] 1 MLJ 266 (refd)
Max-Benefit Sdn Bhd v Phuah Thean An & Anor [2001] 2 CLJ 70, [2001] 1MLJ 553 (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (refd)
Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd [1999] 6 MLJ 220 (refd)
Pancaran Nilam (M) Sdn Bhd v Malayan Banking Bhd [2000] 4 CLJ 793 (refd)
Pembinaan Sima Sdn Bhd v Low Lai Seng Holdings Sdn Bhd [1998] 1 CLJ 159 (dist)
PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [1999] 3 MLJ 157 (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817 (dist)
Reliance Shipping & Travel Agencies v Low Ban Siong [1996] 2 MLJ 543 (dist)
Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn Bhd & 9 Ors [2000] 4 MLJ 200 (refd)
Tan Yang Long & Anor v Newacres Sdn Bhd [1992] 1 MLJ 289 (refd)
United Malayan Banking Corporation Bhd v Aluminex (M) Sdn Bhd & Anor [1993] 3 MLJ 587 (refd)

Legislation referred to

Contracts Act 1950 ss 56(3), 75
Evidence Act 1950 s 92(f)
Housing Developers (Control and Licensing) Act 1966 s 22, 22C, Schedule H
Housing Developers (Control and Licensing) Regulations 1989 reg 11(1), (3)
National Land Code

Appeal from: Summons No. 8–52–3573 of 2001 (Sessions Court, Kuala Lumpur)

Marlene Kuo (Lachaman Lalchand & Associates) for the defendant/appellant
Edward Chan (KC Chan & Company) for the plaintiff/respondent.

Faiza Tamby Chik J:

[1] The issues raised in this appeal are:

(1) Whether there is an issue regarding the need to give notice during the handover of vacant possession.

[2] The solicitor for the defendant submitted that the 'plaintiff set aside their right in bringing this action as they failed to give notice of his intention to claim for damages'. The solicitor of the defendant then referred to s 56(3) of the Contract Acts 1950. It is observed that the plaintiff had duly given the defendant notice vide the plaintiff's letters dated 12 May 2000 when the plaintiff visited the defendant's branch office at the said Apartments and vide their solicitor's letter dated 23 October 2000. See exh 'A–6' of the plaintiff's

4 - 2004_6 pt_2.fm Page 80 Monday, August 9, 2004 3:13 PM

affidavit in reply affirmed by Law Kim on 2 August 2001 (pp 202–206 of the appeal record) and exh 'A–4' of the plaintiff's affidavit in support affirmed by Law Kim on 19 June 2001 (pp 171–185 of the appeal record). I think even though the notice was not given on 5 May 1998, it cannot be construed to mean that the plaintiff has waived his right to claim damages for late delivery. This is because the plaintiff did not do anything during that period and the conduct is not a waiver of this right. Further, the plaintiff's notices dated 12May 2000 are within the material time when compared to the defendant's letters dated 24 April 2000 requesting the plaintiff to take delivery of vacant possession (about two weeks). The plaintiff had given the defendant notice as soon as he received the defendant's said letters. In *Loke Yuen Cheng & Anor v Vimtex Sdn Bhd* [1988] 4 MLJ 169, it was held:

> When time is of the essence of the contract and when the party who is in the right allows the time fixed for completion to pass and the parties go on negotiating, then time is no longer to be regarded as of the essence of the contract. However, the parties here did not allow time to pass nor did they carry on negotiating for completion of the purchase. The appellant did not do anything between 13 November 1992 and 30 November 1992 except to grant the two-month extension. Their conduct was not such as to amount to a waiver.

[3] However, there is no provision in the said sale and purchase agreement which requires the plaintiff to give the said notice. If the defendant required notice to be given by the plaintiff as soon as the defendant breached the time in handing over vacant possession, then the defendant should provide for the same as an important term in the sale and purchase agreement by applying to the authorities for approval to add the terms pertaining to the notice. Instead, cl 22.2 of the sale and purchase agreement did provide that:

> ... the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate ... .

[4] This provision compels the defendant to pay the plaintiff the agreed liquidated damages immediately when the defendant is late in delivering vacant possession but did not mention anything pertaining the need to give notice by the plaintiff. It is true that the sale and purchase agreement is a 'contract', however it was made in accordance with Schedule H of the Housing Developers (Control and Licensing) Act 1966 for accommodation units. As there is a specific Act pertaining to the area of law to it, the Contracts Act 1950, which is a general Act, is therefore not applicable in the instant case. The said sale and purchase agreement was drafted in accordance with 'Schedule H' of the Housing Developers (Control and Licensing) Act 1966 for accommodation type and it is a statutory contract which cannot be 'contracted out', unless with the consent of the Controller of Housing or Government. The intention is to protect purchasers such as the plaintiff from the defendant who has a more bargaining power and who unilaterally takes advantage of interpreting the plaintiff's conduct as a waiver and who could refuse to pay compensation even though in breach of the agreement. Regulation 11(1) and (3) of the Housing Developers (Control and Licensing) Regulations 1989 provides:

4 - 2004_6 pt_2.fm Page 81 Monday, August 9, 2004 3:13 PM

A 11 Contract of sale.

(1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.

B …

(3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions: …

C *(2) Whether there is an issue requiring the plaintiff to prove its loss or damages suffered in order to comply with s 75 Contracts Act 1950.*

[5] It is observed that in exh 'A-1' of the plaintiff's affidavit in support affirmed by Law Kim on 19 June 2001 (p 44 of the appeal record) particularly cl 22.2 it is stated:

D If the Vendor fails to handover vacant possession of the said Parcel, to which water and electricity supply are ready for connection to the said Parcel, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the Purchase Price.

[6] The case before me is a case regarding the sale and purchase agreement E wherein the plaintiff claims for agreed liquidated damages pursuant to the said agreement. The measure of damages has been agreed between both parties and not made by one party unilaterally. It is also not a measure too exorbitant or unreasonable. In fact, the said sale and purchase agreement was prepared by the defendant. Now when the defendant has breached the sale and purchase F agreement and the plaintiff suffered loss as a consequence of the defendant's breach, the defendant refused to pay the plaintiff damages unless the plaintiff proves the said loss. In *Lebbey Sdn Bhd v Tan Keng Hong & Anor* [2000] 1 AMR 156 (see also [2001] 7 MLJ 521) I held at p 157:

1 Section 75 of the Act clearly provides inter alia that a party to an agreement shall be entitled to reasonable damages not exceeding the amount agreed upon G as liquidated damages in the event of a breach by the other party to the agreement, and whether or not actual damage or loss is proved to have been caused by such a breach. The provisions of s 75 of the Act should be interpreted in a literal manner, and be given its plain and ordinary meaning. To interpret the said section in any other manner, would be contrary to the express provisions of the said section.

H 2(a) The appellant's averment that the respondent had not suffered any loss and/or failed to prove any such loss, is irrelevant, bearing in mind the literal interpretation of the provisions of s 75 of the Act, and in view of the provisions of cl 16 of the SPA, which were drawn up by the appellant itself. The appellant is bound by the terms of the agreement and is estopped from breaching the same. The appellant thus cannot rely on the provisions of s.75 of the Act to avoid paying the respondents the agreed liquidated damages. I

[7] The application of s 75 of the Contracts Act in cases like *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, *Reliance Shipping*

4 - 2004_6 pt_2.fm Page 82 Monday, August 9, 2004 3:13 PM

& Travel Agencies v Low Ban Siong [1996] 2 MLJ 543 and *Pembinaan Sima Sdn Bhd v Low Lai Seng Holdings Sdn Bhd* [1998] 1 CLJ 159 referred to by the defendant's solicitor are not applicable here because the facts are different, ie the said cases are not cases on late delivery of vacant possession pursuant to the Housing Developers (Control and Licensing) Act 1966. In fact, the application of *Selva Kumar* was rejected by me in the case of *Lebbey Sdn Bhd v Tan Keng Hong & Anor* [2000] 1 AMR 156. In *Max-Benefit Sdn Bhd v Phuah Thean An & Anor* [2001] 2 CLJ 70 (see also [2001] 1 MLJ 553), the court said:

> This was an appeal by the appellant housing developer against summary judgment in the magistrates' court given in favour of the respondents. The respondents had purchased a property ('the property') from the appellant and assigned their rights and interests in the property to a local bank in return for a housing loan.
>
> The issues were: (1) whether the respondents had the locus standi to sue the appellant in view of the said assignment above; and (2) whether the respondents could sue the appellant for damages for late delivery.
>
> Held:
>
> (1) The assignment was purely for the purpose of securing the loan. The rights and interests over the property were assigned as surety to ensure that the loan would be repaid.
>
> (2) The assignment of the equitable chose in action would come to an end and revert back to the respondents on one of two events taking place: (i) where the loan was fully repaid; and (ii) where the appellant obtained legal title to the property and the property was then transferred to the respondents with the consent of the assignee bank. Thus, the assignment was conditional and not absolute and was assigned by way of a charge to the assignee bank. As there was no absolute assignment, the assignee bank had no locus standi to sue the appellant. It followed that the respondents had the locus standi to sue the appellant.
>
> (3) Clause 22 of the sales and purchase agreement of the property is a mandatory provision inserted pursuant to cl 20(1) of sch G to the Housing Developments (Control and Licensing) Regulations 1989 which entitles a purchaser to damages for late delivery. As vacant possession was delivered late on 22 June 1998 when in fact it should have been delivered on 15 September 1997, the respondents as purchasers were entitled to the liquidated damages they had claimed.

[8] For these reasons I hold that the plaintiff need not prove its loss pursuant to s 75 of the Contracts Act 1950 as cl 22 of the sale and purchase agreement between the plaintiff and the defendant is mandatory in nature.

(3) Whether there is an issue regarding locus standi

[9] In the instant case even though the plaintiff did sign the deed of assignment dated 6 June 1996, the plaintiff's capacity to institute this action was not prejudiced because the assignment by the plaintiff to the bank is not an absolute assignment. The deed of assignment is merely an assignment by way of charge. In exh 'A–2' of the plaintiff's affidavit in support affirmed by Law Kim on 19 June 2001 (p 141–165 of the appeal record) wherein cl 3 (p 144) states:

4 - 2004_6 pt_2.fm Page 83 Monday, August 9, 2004 3:13 PM

> At such time as there shall be issued a separate document of title to the said Property the Assignor(s) shall within one (1) month from the date of receipt of a notice in writing requesting him/her/them/it so to do take an instrument of transfer of the said separate title or strata title, as the case may be, and execute an instrument of first legal charge over the said Property in favour of the Bank such charge to be in the Bank's standard form in sue at the time of such charge for securing the payment of the Bank of the balance of the monies owing under the Citihome Facility Agreement. On the registration of such instrument of charge the Citihome Facility Agreement shall forthwith determine save and except for any antecedent breach or default of the assignor(s).

[10] Therefore it can be seen that the plaintiff is bound to take steps to register the transfer to himself and to execute a memorandum of charge pursuant to the National Land Code to protect the bank. Therefore it is clear that the said assignment is merely an assignment by way of charge and not absolutely. In the same exhibit at cl 7 (p 145 of the appeal record) there is a repetition of the intention of both parties to treat the same as an assignment by way of charge wherein it states:

> This Assignment shall remain in force until such time as it shall be revoked by the due execution and registration thereof by the Assignor(s) of a first legal charge over the separate strata document of title to the said Property in favour of the Bank.

[11] It is evident that the intention of both parties has been repeated over and over again throughout the agreement in that the plaintiff is entitled to redeem his home or apartments anytime when the plaintiff pays all outstanding sum owing to the bank. In *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn Bhd & 9 Ors* [2000] 3 AMR 3567 (also see [2000] 4 MLJ 200) at p 3573 para (1)(a) & (b) it was held:

> 1(a) The type of arrangement between plaintiffs 44–73 and the financial institutions are recognised as an 'equitable mortgage' or an 'equitable charge' by the Federal Court in *Chuah Eng Khong v Malayan Banking Berhad* [1998] 3 AMR 2729. Therefore, there was no reason why the word 'charge' in s 4(3) of the Civil Law Act 1956 should not include equitable charge of this nature. In the circumstances, as the loan agreement cum assignments between plaintiffs 44–73 and the financial institutions purported to be by way of charge, the plaintiffs did not lose their rights to pursue their claims.
>
> (b) Further, from a perusal of the loan agreements cum assignments 'within their four corners', they could not be interpreted to be absolute assignments by plaintiffs 44–73 to the financial institutions. Though the word 'absolute' appeared in the documentation of the loan agreement cum assignments there were other clauses to show that the rights and interests in the sale and purchase agreements so assigned had not been transferred to the assignors.

[12] In *Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd* [1999] 6 MLJ 220 it was held at pp 220–221:

> (1) The loan cum assignment is essentially entered into by way of security for a loan that is repayable on demand. The fact that the loan cum assignment is entered into by way of security for a loan would not by itself prevent it from being absolute, but when that fact is considered together with other facts and clauses in the instrument, it does show that the assignment is intended by way of charge only.

4 - 2004_6 pt_2.fm Page 84 Monday, August 9, 2004 3:13 PM

(2) Despite the fact the word 'absolutely' is used in the assignment clause (cl 4), there are other clauses which show that the full and entire benefit of the agreement and all rights, title and interests of the appellants therein have not been transferred to the respondent.

(3) The effect of cl 14 of the agreement is to render the assignment a conditional and not an absolute one. The repayment of the loan as well as the execution and registration of the charge is an uncertain event, the result of which makes the assignment conditional.

[13] In *Tan Yang Long & Anor v Newacres Sdn Bhd* [1992] 1 MLJ 289 it was held at p 290:

(1) At the time the assignment was executed there was no title to the apartment in existence. However, notwithstanding the purported assignment, cl 2.4 clearly shows that the legal right to the title deed continued to be vested in the plaintiffs who were only required to change the property to Metroplex as and when the separate document of title was issued whilst remaining on record as legal owners. Therefore, the plaintiffs had the necessary capacity to sue.

[14] In *Chuah Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97 it was held at pp 97–98:

(1) At common law and under the relevant rules of equity, the loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the land. Although nowhere in the loan agreement was the word 'mortgage' used, it is a security transaction in connection with the loan given by the lender with a provision for repayment, after which, the borrower shall be entitled to obtain a discharge and release of the lot from the lender. The borrower at the time of signing the loan agreement had no legal estate but only an equitable interest as a purchaser by contract from a housing developer. This gave the borrower a second right to redeem after the contractual right to redeem the land by a contractual date had lapse due to expiry of time. Further, there was no deposit of document of title with the lender.

[15] **[15]**In *PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [1999] 3 MLJ 157 it was held at p 158:

(3) An absolute assignment by a borrower of all his rights over immovable property that has no issue document of title to a lender as security for a loan is an equitable mortgage. Accordingly, the assignment, being an absolute assignment of the respondent's right over the subject property to the appellant, is an equitable mortgage (also known as an equitable charge in the context of our jurisprudence). The court therefore must reject the appellant's contention that the assignment does not amount to an equitable charge.

[16] In *Mahadevan & Anor v Manila & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 it was held at p 266:

Held (5) There is no provision in the National Land Code prohibiting the creation of equitable charges or liens. Therefore equitable charges and liens are permissible under our land law. The words 'other charge on land' in s 2(1) of the Limitation Act must be construed to include equitable charges and liens as well.

[17] Even if the said assignment is interpreted in the manner by the defendant it is evident that the bank had duly reassigned the plaintiff's right

4 - 2004_6 pt_2.fm Page 85 Monday, August 9, 2004 3:13 PM

to claim all losses, compensation and costs from the defendant for late delivery of vacant possession of the apartments by the defendant to the plaintiff vide a deed of reassignment dated 19 March 2001, a copy of which has been extended to the defendant. (See exh 'A–3' at pp 166–170 of the appeal record which is in the plaintiff's affidavit in support affirmed on 19 June 2001).

[18] I note that the defendant's solicitor had submitted that 'Basically an assignment is an absolute assignment' and refers to s 4(3) of the Civil Law Act 1956 and the case of *Pancaran Nilam (M) Sdn Bhd v Malayan Banking Bhd* [2000] 4 CLJ 793 (see also [2000] 4 MLJ 625) to support his contention. The defendant's solicitor also referred to the clause used in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 and *Pancaran Nilam* at p 807 para (d) to state that as 'the same clause contained in the deed of assignment to Citibank Bhd' was used, ie the said clause uses the words 'assigns absolutely' therefore the assignment by the plaintiff to Citibank Bhd should supposedly be absolute. Firstly *Pancaran Nilam* is not applicable to this case because the facts of the case in *Pancaran Nilam* is different from the facts of this case. In *Pancaran Nilam*, the plaintiff in that case brought an action against the defendant to foreclose the property which had been secured for loan purposes by public auction whereas in this case the plaintiff in this action is seeking damages for breach of the sale and purchase agreement by the defendant entered into between the plaintiff and the defendant. The issue in *Pancaran Nilam* is different, ie whether the plaintiff as the bank is empowered to foreclose the said security. There was no dispute as to whether the assignment in the said case was absolute. (See p 808 para c and p 810 para d — '... from the record it is clear that the defendant did not dispute the fact that the assignment was an absolute assignment.'). In the instant case the plaintiff denies that the assignment to the bank is absolute. Referring to the clause used in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* in *Pancaran Nilam*, the test whether an assignment is absolute or not is not merely by referring whether the words 'absolute assignment' were used. It is also not merely by referring whether a 'similar clause' with the *Nouvau* has been used. Every case need to be studied thoroughly pertaining to the four corners of the agreement, the surrounding circumstances of the case, the factual background of the case or the intention of the parties when entering into agreement. In *Chitty on Contracts* (27 Ed) Vol 1 at para 1396, the test used to ascertain whether an assignment is absolute or not is as follows:

> The test seems to be, has the assignor unconditionally transferred to the assignee for the time being the sole right to the debt in question as against the debtor? If so, the assignment will be absolute; but if the debtor cannot tell whether to pay the assignor or the assignee without examining the state of accounts between them, it will be held to be by way of charge only. Much may depend on the language of the particular instrument; in construing it, the court will look at the whole of its language. The words italicised above are of crucial importance, for it is no concern of the debtor whether the assignor and assignee have some private arrangement for the disposal of the debt after it has been paid by the debtor.

[19] This test was applied in the case of *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd* [1997] 3 MLJ 620 at p 634. I am of the view that in order to ascertain whether an assignment is absolute or not, all the

4 - 2004_6 pt_2.fm Page 86 Monday, August 9, 2004 3:13 PM

terms of the instrument must be considered, and whatever may be the phraseology adopted in some particular part of it, if on the consideration of the whole instrument, it is clear that the intention was to surrender the entire rights of the debt or chose in action to the assignee, only then can it be said to be an absolute assignment. In the *Nouvau*, it is true that the Federal Court had said whether an assignment is absolute or not, is to be derived from the four corners of the instrument. However, in the case of *United Malayan Banking Corporation Bhd v Aluminex (M) Sdn Bhd & Anor* [1993] 3 MLJ 587 (applied in the case of *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd*), the Supreme Court held that in construing an assignment, evidence is admissible to show in what manner the assignment was related to existing facts pursuant to s 92(f) of the Evidence Act 1950, that is to say, the assignment would have to be construed not only by having regard to the words appearing therein, but also with regard to the surrounding circumstances.

[20] In the instant case it cannot be denied by the defendant that:

(a) the assignment was made in consideration for loan granted by the bank to the plaintiff, as a borrower;

(b) there are no individual documents of title issued to the apartments offered as securities for the loans to enable a legal charge to be created over them;

(c) the assignment by the plaintiff to the bank are of the plaintiff's rights and interest in the sale and purchase agreements they entered with the defendant, when he purchased the apartments;

(d) there are convenants by the bank as assignor to reassign the said apartment back to the plaintiff in the event individual documents of title are issued, and if the loans are still then subsisting, to create registrable legal charges over the properties so secured;

(e) and if individual documents of title were not issued when the loans are repaid the assignors would reassign back the rights and interest in the sale and purchase agreements to the plaintiff.

[21] This type of arrangement is presently recognised as an 'equitable mortgage' by the Federal Court in the case of *Chuah Eng Khong v Malayan Banking Bhd* and it has been applied in the case of *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn Bhd & 9 Ors* where the judge in that case found that in scrutinizing the entire loan agreement and assignment from the four corners, the said documents cannot be interpreted to be an absolute assignment even though the word 'absolute' was used. This is because there are other clauses that could show that the rights and interests in the sale and purchase agreement even though assigned were not transferred to the assignee. In *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn Bhd & 9 Ors*, at p 3592 para 40 it was stated:

> Further, after perusing these loan agreement cum assignments, I honestly, within the four corners of these documents cannot interpret them to be absolute assignments by these plaintiffs to the financial institutions. Though the word 'absolute' appears in the documentation of these loan agreement cum assignments, there are also other clauses to show that the rights and interest in the sale and purchase agreements so assigned have not been transferred to the assignors.

4 - 2004_6 pt_2.fm Page 87 Monday, August 9, 2004 3:13 PM

[22] In the instant case there is cl (7) at p 1 of the deed of assignment which provides:

> Until the issue of a separate strata title to the said Property, the Bank has agreed to accept this Assignment as security for the Citihome Facility.

[23] Clause 3 at p 2 of the deed of assignment also provides:

> At such time as there shall be issued a separate document of title to the said Property the Assignor(s) shall within one (1) month from the date of receipt of a notice in writing requesting him/her/them/it so to take an instrument of transfer of the said separate title or strata title, as the case may be, and execute an instrument of first legal charge over the said Property in favour of the Bank such charge to be in the Bank's standard form in use at the time of such charge for securing the payment of the Bank of the balance of the monies owing under the Citihome Facility Agreement. On the registration of such instrument of charge the Citihome Facility Agreement shall forthwith determine save and except for any antecedent breach or default of the Assignor(s).

[24] According to the said cl (7) this assignment is only an assignment of rights as security and according to cl 3, the plaintiff was bound (shall) to take steps to register the transfer to himself and to execute a memorandum of charge pursuant to the National Land Code to protect the bank. Therefore it is clear that the said assignment is merely an assignment by way of charge and not absolutely. In *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* [1995] 4 MLJ 804 at p 810, it is stated:

> It seems to me that *Nouvau Dor (M) Sdn Bhd v Faber Development Sdn Bhd* had ignored the loan agreement that was executed and that was part of the 'surrounding circumstances' with the result that the aim of the transaction was totally ignored. Financial institutions are not in the business of buying properties and to construe the transaction in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* as an absolute assignment has that effect. Such a transaction, that is an assignment of property to a financial institution not by way of charge, is not sanctioned under the Banking and Financial Institutions Act 1989 since such assignment, which is not regarded as by way of a charge, would result in the financial institution being engaged in the business of buying and selling property which is not something that the Banking and Financial Institutions Act 1989 allows any financial institution to do. There is still another unreasonable result of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* and it is this. Every purchaser of property, who obtains a loan from a financial institution and who, because of the unavailability of an individual title to the property, employs the instruments of a loan agreement and assignment which the court says is an absolute assignment and not by way of charge, would be that the purchaser would have to declare a disposal and the bank to declare an acquisition of an asset under the Real Property Gains tax Act 1976. Similar declarations would have to be made conversely when the individual title to the property is thereafter issued and the purchaser becomes registered as the owner because this can only take place after the financial institution had either re-assigned or disposed the property back to the purchaser. Surely, that was not the aim of the transaction. The whole transaction involves a loan from the financial institution to the purchaser to enable the purchaser to purchase the property and the loan agreement and assignment was for the purpose of securing the loan. Notwithstanding the language use, surely that was the aim of the whole transaction and the assignment was purely for the purpose of securing the loan and hence the assignment must be by way of

4 - 2004_6 pt_2.fm Page 88 Monday, August 9, 2004 3:13 PM

a charge. The loan agreement referred to in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* should not have been ignored. I would prefer to follow the principles of law stated in Lewison on Interpretation of Contracts, at p 44, para 2.10, supra, which seems to have been, though not specifically, the position adopted in *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 1 AMR 929 (Federal Court decision) at p 941 where it was said:

> 'Regard must also be had to any surrounding circumstances, if any, which might legitimately taken into consideration.'

The assignment to the financial institutions in the instant case must surely have been by way of charge. The defendants did not produce any document to show otherwise. Thus, I am of the view that the plaintiffs can commence an action without the consent of the financial institutions.

[25] It is observed that when *Nouvau* was decided, the assertions and issues mentioned in the cases put forward were not debated. However. the cases put forward by the plaintiff like *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd* [1995] 4 MLJ 804, *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn Bhd & 9 Ors* and *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd* had considered *Nouvau* and had distinguished the same to hold that when construing an assignment, it should be done not only by referring to the wordings used in the said assignment but also to the surrounding circumstances of the said case. Exhibit 'A–3' at p 166–170 of the appeal record (plaintiff's affidavit in support affirmed on 19 June 2001) which is the deed of reassignment dated 19 March 2001 has reference. I think the plaintiff's rights could be divided into various rights, for example: (1) right to have the apartments built according to the building plans and approved specification, (2) right to have a separate title or strata title, (3) right to have the apartments transferred, (4) right to have whatever defects on the apartments made good, (5) right to have a certificate of fitness of occupation, (6) right to have vacant possession delivered within the time provided and so on. What has been assigned was (6) right to have vacant possession delivered within the time provided. Vide the deed of reassignment, the plaintiff has the right to commence this action against the defendant. Reference is made to the Housing Developers (Control and Licensing) (Amendment) Act 2002 which had the Royal Assent on 23 January 2002 and was published in the Gazette on 31 January 2002. Although it is in the process to be enforced, it reflects the intention of Parliament as the Legislature on this issue. The amended s 22 with the new entry of s 22C is as follows:

> Right to initiate and maintain actions
>
> Notwithstanding anything contained in any written law or any rule of law, a homebuyer as defined in section 16A shall be entitled on his own volition and in his own name to initiate, commence, institute and maintain in any court or tribunal any action, suit or proceeding against a housing developer or any other person in respect of any matter arising out of the sale and purchase agreement entered into between the purchaser and that housing developer unless a contrary intention is expressed in any agreement, assignment or charge between the homebuyer and his financier in which case the prior written consent of his financier must first be obtained before he exercises any of his rights under this section.

4 - 2004_6 pt_2.fm Page 89 Monday, August 9, 2004 3:13 PM

[26] In the instant case the plaintiff has duly obtained the consent from the bank when the plaintiff executes the deed of reassignment dated 19 March 2001. For these reasons the assignment by the plaintiff to the bank is not an absolute assignment but an assignment by way of charge and therefore the plaintiff has locus to commence this action.

[27] It is clear from the submission of the defendant's solicitor and the affidavit and 'defence' filed that the defendant does not have any defence on merits. In fact, the defendant did not deny that they are in breach of the sale and purchase agreement entered between the plaintiff and the defendant. What was raised were notice, prove of damage and locus wherein these are technicalities and not strict defences on merit deserving a full trial. The matters relating to notice, prove of damage and locus are not something new to the instant case. In fact, it has been dealt with in cases like *Loh Hoon Loi & Ors v Viewpoint Properties (Sabah) Sdn Bhd*, *Steven Phoa Cheng Loon & 72 Ors v Highland Properties Sdn Bhd & 9 Ors*, *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd* and *Max-Benefit Sdn Bhd v Phuah Thean An & Anor* since 1995 wherein decisions made were favourable to the purchasers. This is because the purchasers were the ones having less bargaining power when the sale and purchase agreements were executed and the breach was clearly by the seller. The learned sessions court judge had made a right decision when allowing the plaintiff's application for summary judgment. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 it was held at para 3 (at p 401):

> Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the court should exercise its duty under O.I4 if the legal point is understood and the court is satisfied it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'.

[28] For these reasons the appellant's appeal is hereby dismissed with costs.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed